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18  
19 **UNITED STATES DISTRICT COURT**  
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21 **CENTRAL DISTRICT OF CALIFORNIA**

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MASIMO CORPORATION

16 Plaintiff,

17 v.

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POLITAN CAPITAL  
MANAGEMENT LP, POLITAN  
CAPITAL MANAGEMENT GP LLC,  
POLITAN CAPITAL PARTNERS GP  
LLC, POLITAN CAPITAL NY LLC,  
POLITAN INTERMEDIATE LTD.,  
POLITAN CAPITAL PARTNERS  
MASTER FUND LP, POLITAN  
CAPITAL PARTNERS LP, POLITAN  
CAPITAL OFFSHORE PARTNERS  
LP, QUENTIN KOFFEY, MICHELLE  
BRENNAN, MATTHEW HALL,  
AARON KAPITO, WILLIAM  
JELLISON, DARLENE SOLOMON,

Defendants.

Civil Action No. 8:24-cv-01568-JVS-JDE

**PLAINTIFF'S REPLY IN SUPPORT  
OF MOTION FOR PRELIMINARY  
INJUNCTION**

Hearing Date: September 9, 2024  
Time: 1:30 PM  
Courtroom: 10C  
Honorable James V. Selna

**REDACTED VERSION OF  
DOCUMENT PROPOSED TO BE  
FILED UNDER SEAL**

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1 **I. INTRODUCTION**

2 This is a paradigmatic situation where injunctive relief is necessary to prevent  
3 irreparable harm. Federal law prohibits false and misleading proxy disclosures.  
4 Investors like Politan must make certain disclosures when they intend to take actions  
5 that could alter control of the company. Those requirements ensure that stockholders  
6 have information necessary to make informed decisions. Injunctive relief is the  
7 *preferred* remedy for a breach of those obligations—particularly where (as here) the  
8 outcome of a stockholder vote would dramatically affect the company’s future.

9 It is now undisputed that the proxy materials Politan distributed were false  
10 and misleading—Politan has belatedly attempted to backfill its disclosures by  
11 correcting some of its glaring falsehoods. But merely correcting a few details does  
12 not undo the false narrative that Politan has foisted upon Masimo’s stockholders, nor  
13 does it supply the specific information to which they are entitled under federal law.  
14 Even limited discovery has revealed the extent to which Politan’s disclosures have  
15 misstated the facts:

- 16 • In the imaginary universe Politan constructed in its  
17 securities filings, Politan was just a broadly-focused  
18 investor using its general funds to invest in Masimo, with  
19 no intent to take control. But discovery has shown that  
20 Politan in fact solicited investors for a “Single Investment”  
21 in Masimo, it did not invest in any other company during  
22 the relevant period, and its plan from day one was to take  
23 control. Stockholders were entitled to know these facts  
24 and the identities of Politan’s investors.
- 25 • In Politan’s fictional world, Koffey was a stalwart  
26 fiduciary, selflessly pursuing better corporate governance  
27 for the benefit of all stockholders. But discovery has  
28 shown that while he was on notice of pending litigation  
against Masimo, Koffey secretly used his status as a  
director to solicit former employees to bad-mouth Masimo  
about facts relevant to that case—some of whom  
(coincidentally, according to Politan) ended up as  
“confidential witnesses” in that pending litigation.

1 Stockholders are entitled to know how Koffey abused his  
2 fiduciary status to benefit himself, disregarding the harm  
3 it could cause to Masimo.

4

- 5 In Politan's alternate reality, Masimo's board gave Kiani  
6 unchecked authority to pursue significant transactions  
7 with no oversight and to demand self-interested terms,  
8 while keeping Koffey and Brennan in the dark. Discovery  
9 has shown that Politan's assertions were false, Koffey and  
Brennan were not denied access to anything, and the key  
terms were proposed by Koffey. (This part of the  
discovery process was more challenging because Koffey  
destroyed his notes of the relevant board meetings.)

10

11 Politan asks the Court to ignore these misstatements because Politan has now  
12 disclosed Masimo's Complaint, and because *Masimo itself* has taken steps to correct  
13 the harm. Those arguments fail: federal law requires *Politan* to tell stockholders the  
14 truth. Politan cannot meet its affirmative obligation simply by citing Masimo's  
15 efforts and publishing Masimo's pleadings—which Politan has denied, and which  
16 do not even contain all the information Politan is required to disclose. Politan cannot  
17 avoid its obligations by citing Masimo's own efforts. Politan itself must correct the  
18 harm it caused.

## 19 **II. ARGUMENT**

### 20 **A. Without an Injunction, Masimo and Its Stockholders Will Suffer 21 Irreparable Harm**

22 *First*, Defendants argue that an uninformed stockholder vote *alone* cannot  
23 constitute irreparable harm (Opp. 35), but that is a strawman. The contested election  
24 for control of Masimo creates a high likelihood of irreparable harm that cannot be  
25 unwound after-the-fact or redressed with damages. Mot. 27-29; *Allergan, Inc. v.*  
26 *Valeant Pharms. Int'l*, 2014 WL 5604539, \*16 (C.D. Cal. Nov. 4, 2014) (uninformed  
27 stockholder vote is irreparable harm, and prevention through corrective disclosure is  
28 preferable to post-vote remedies). Defendants largely ignore Plaintiff's authorities.

1 Opp. 35 (distinguishing one of ten cited cases). Defendants' cited authorities have  
2 entirely different facts (*Eisner v. Meta Platforms, Inc.*, 2024 WL 3228089, \*7 (N.D.  
3 Cal. June 28, 2024) (alleged disclosure violations were unactionable and  
4 unsubstantiated); *Masters v. Avanir Pharms., Inc.*, 996 F. Supp. 2d 872, 886 (C.D.  
5 Cal. 2014) (involving challenge to vote on equity compensation plan which could  
6 be "nullified" and "unwound")), or support irreparable harm (*Johnson v. Saba  
7 Capital Management*, 2023 WL 1345717, \*4 (S.D.N.Y. Jan. 31, 2023) (unwinding  
8 transactions—such as those that result in a change of control—based on uninformed  
9 vote effectuates irreparable harm)).

10 *Second*, Masimo demonstrated specific irreparable harm that Defendants do  
11 not dispute would result from a change in control of the Board:

12

- 13 • Politan's nominees, if elected, would remove the  
14 founder/CEO, Kiani. Mot. 29. And, Masimo's COO and  
hundreds of Masimo engineers have threatened to leave "if  
Joe Kiani is replaced by Quentin Koffey and Politan  
Capital." Exs. 104; 133.
- 15 • Politan's nominees, if elected, are likely to execute a major  
16 restructuring, including by separating the Consumer  
17 Products Business. Koffey and Brennan have already  
delayed a value-maximizing transaction involving that  
business and stated that Masimo should give it away for  
nothing. Ex. 72; Muhsin ¶¶3-4; Reynolds ¶¶11-13; Mot.  
18 28.<sup>1</sup>

19

20 **B. Masimo Is Likely to Succeed on The Merits**

21

22 **1. Politan's Secret Communications With Former Employees,  
23 Customers, and Competitors Must Be Disclosed**

24

25 Defendants' undisclosed communications with former Masimo employees are  
26 worse than previously believed. Defendants now concede they recruited former  
27 Masimo employees to privately speak to them *while Koffey served on the Board*.

28

---

29 <sup>1</sup> Defendants' reliance on *Arcturus Therapeutics v. Payne*, 2018 WL 2316790 (S.D.  
Cal. May 22, 2018), is misplaced. *Arcturus* found irreparable harm where, like here,  
"shareholders face[d] a vote on a proxy contest without being informed of the truth  
behind their choices." *Id.* \*8.

1 Ex. 140, -3. Defendants admit that one of those former employees (who later became  
2 a confidential witness in the Securities Class Action) told Defendants that Masimo  
3 had *not engaged in channel stuffing*. *Id.* Yet Politan argued the exact opposite in its  
4 proxy materials, quoting another former employee who coincidentally (Defendants  
5 say) appeared in the Securities Class Action. Ex. 113, -47.

6 Defendants downplay the fact that Politan attempted to discredit Masimo’s  
7 public statements while Masimo is defending those very statements in litigation by  
8 calling the interviews “standard investment due diligence.” Opp. 15. But  
9 Defendants’ own documents prove (and common sense supports) that these secret  
10 communications were neither “standard” nor “investment due diligence.”

11 **Defendants’ Recruiting Was Not “Standard.”** Defendants’ late-disclosed  
12 “expert report” from another serial activist investor (Taxin) declaring that “[s]ome  
13 activists even continue their analysis after they achieve board representation.” Taxin  
14 ¶61. Taxin himself has never served on a public-company board, and even he  
15 describes talking to former employees *while on a board* as the exception. The only  
16 example he provides—Trian Partners—describes the opposite of what Defendants  
17 did here. *Id.* According to Taxin, when activist-investor Trian joins a board, Trian  
18 produces “binders of information … to help the board and management.” *Id.*  
19 Defendants did none of that, and, to the contrary, Kapito concedes he did not “share  
20 the information” he learned from these purported diligence calls “with anyone  
21 outside Politan,” because he viewed that information as “proprietary investment  
22 research.” Kapito ¶22. Nor did Koffey tell anyone at Masimo that he was explicitly  
23 relying on his status as a board member to access information that would have  
24 otherwise violated the investigators’ prohibitions (and so would not have been  
25 available to him). All of this was done *in secret*, without telling any Masimo director  
26 or member of management. Chapek Reply ¶¶6-7; Kiani Reply ¶¶3-5; Reynolds  
27 Reply ¶¶5-6.

28

1                   Koffey insists he told CFO Micah Young that Politan “use[s] these consultant  
2 networks and so does everyone else.” Opp. 16. But Young (and Board members)  
3 all say Koffey never told them Politan used AlphaSights and Mosaic *after* Koffey  
4 joined the Board. Young Reply ¶¶4-5; Chapek Reply ¶¶6-7; Reynolds Reply ¶¶5-6.  
5 Even Koffey [REDACTED]

6 [REDACTED]. Ex. 135, 79:9-83:4. Of course, Defendants’  
7 expert offers no opinion that secretly recruiting former employees to critique the  
8 company while serving on the board—much less while the company is defending a  
9 securities class action involving the same issues—is standard or appropriate. *Cf. In*  
10 *re STEC Deriv. Action*, 2012 WL 8978155, \*4-6 (C.D. Cal. Jan. 11, 2012) (Selna,  
11 J.) (granting stay pending securities class action because a “concurrent prosecution  
12 of the derivative action” is “likely not in [company]’s best interest”).

13                   Compounding the omissions, Defendants now concede that their covert  
14 outreach did not stop at former employees. Kapito admits that in 2023, he spoke to  
15 *seven* Masimo customers *or* competitors. Kapito ¶17. At the same time Politan was  
16 recruiting recently departed Company employees, [REDACTED]

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] Ex. 120, -7912. Secretly  
20 communicating with customers, or worse, competitors, is a blatant violation of the  
21 fiduciary duties Koffey owed to Masimo stockholders about which stockholders  
22 have a right to be informed, and raises other serious legal issues (like antitrust) that  
23 Defendants’ proxy materials *still* do not address.

24                   **Defendants’ Recruiting Was Not “Investment Due Diligence.”**  
25 Defendants argue that they can “moot” their false and misleading statements by now  
26 admitting they spoke to a former employee who told them Masimo had not channel  
27 stuffed, claiming that such outreach was only “investment due diligence.” Opp. 15-  
28 17. But Defendants have not corrected their proxy statements falsely claiming

1 Masimo *had* engaged in channel stuffing. Ex. 113, -47. And Defendants ignore  
2 documents (that they produced the night before Plaintiff filed its renewed  
3 preliminary injunction brief) that prove Defendants recruited other former  
4 employees to dig up dirt on Masimo, not to help with an “investment.” *E.g.*, Exs.  
5 131; 126; 128; 129.

6 Kapito claims not to have known about the Securities Class Action until  
7 Koffey sent him a copy of the amended complaint in February 2024. Kapito ¶23.

8 Koffey likewise contends [REDACTED]

9 [REDACTED] But Koffey’s own documents show [REDACTED]

10 [REDACTED]  
11 [REDACTED] One of the challenged statements in that amended complaint  
12 involves the separation of former Masimo/Sound United employee [REDACTED]  
13 Ex. 122 ¶¶280-281. Kapito already knew about [REDACTED]. Indeed, [REDACTED]

14 [REDACTED]  
15 [REDACTED]

16 [REDACTED]  
17 [REDACTED]

18 [REDACTED]  
19 [REDACTED]

20 [REDACTED]  
21 [REDACTED]. After

22 all, what “diligence” could [REDACTED] provide in April 2024, when he left Masimo almost  
23 a year earlier? Those slide-deck drafts included [REDACTED]

24 [REDACTED]  
25 [REDACTED]. And sure

26 enough, when Defendants published their proxy materials a few weeks later, they  
27 parroted the Securities Class Action’s allegations suggesting that Masimo had made  
28 false statements about [REDACTED] separation and channel stuffing. Ex. 113, -66.

1 Defendants were using AlphaSights and Mosaic not for “standard investment due  
2 diligence,” but to harvest negative information to weaponize in the proxy contest.  
3 Defendants’ “mooting” disclosure does not remedy these false and misleading  
4 statements—it amplifies them. *See In re PMTS Liquidating Corp.*, 526 B.R. 536,  
5 545 (D. Del. 2014) (director has a duty of disclosure “when he ‘is personally engaged  
6 in transactions harmful to the corporation, but beneficial to the director.’”)(citation  
7 omitted).

8 **2. Information Regarding Politan’s Investors and Its  
9 Longstanding Control Intent Must Be Disclosed**

10 The Opposition is notable for what it does not dispute concerning Politan’s  
11 violations of Rules 13d-101, 14a-3, and 14a-101. Defendants do not dispute that  
12 Politan did not purchase securities *for any other issuer beside Masimo* from at least  
13 May 17, 2022, to at least November 14, 2022—during which time Politan acquired  
14 4.6 million shares, constituting approximately 8.8% of Masimo. Ex. 116. Nor do  
15 Defendants dispute that Politan fundraised using its “Single Investment”  
16 PowerPoint, which pitched Masimo as Politan’s sole target, highlighted a “Clear  
17 Path to Board Seats,” [REDACTED], and  
18 specifically noted that [REDACTED]. Ex. 4, -  
19 1237, -1268, -1272. Indeed, Defendants acknowledge Politan told potential  
20 investors that its plans for their investments were to, at a minimum, acquire a large  
21 enough stake in Masimo that Politan could [REDACTED]  
22 [REDACTED] Opp. 32.

23 Rules 13d-101, 14a-3, and 14a-101 thus required Politan to disclose additional  
24 information, including: (1) the identity of the investors that funded Politan’s  
25 acquisition of Masimo stock and activist campaigns; (2) a description of Politan’s  
26 agreements with those investors; and (3) Politan’s intention to take control of the  
27 Masimo Board. Politan’s failure to do so renders its Proxy Materials misleading.  
28

**a. Politan Must Disclose Its Investors**

Schedule 13D Item 3 requires Politan to “*state the source and the amount of funds* … used … in making the purchases, and if any part of the purchase price is or will be represented by funds … *obtained for the purpose of acquiring, holding, trading or voting the securities, a description of the transaction and the names of the parties thereto.*” 17 C.F.R. § 240.13d-101, Item 3 (emphasis added). Politan failed to do so, and must provide the required disclosure to address this glaring omission, which renders its Section 14(a) proxy solicitation materials misleading.

Politan's only response is that it

10 [REDACTED]  
11 [REDACTED] Opp. 34. In other words, Politan points to itself as the source of  
12 the funds, without providing “the names of the parties” that provided funds “for the  
13 purpose of acquiring” Masimo stock.

14 Schedule 13D prohibits such circular reasoning. Indeed, what Politan argues  
15 is precisely what the defendant argued in *Victory Markets, Inc. v. Nelson*, where the  
16 defendant pointed to “personal funds and personal borrowings.” 1982 WL 2278, \*3  
17 (N.D.N.Y. Mar. 26, 1982). The court held that such disclosure was insufficient, and  
18 required defendants to disclose the specific “terms of funding or financing,”  
19 including the “names of the parties involved.” *Id.* \*5. It held that concealing “the  
20 true source of funds used to purchase the Smith stock … subverts one of the Williams  
21 Act’s purposes: ‘to require full and fair disclosure for the benefit of investors.’” *Id.*  
22 (citation omitted). Thus, when an entity pools investors’ resources for the purpose  
23 of investing in an issuer—as the “Politan Funds” did here—it is insufficient for that  
24 entity to point to itself as the “source” instead of disclosing the “names of the parties”  
25 to the “transactions” giving rise to its possession of the funds it used to purchase the  
26 securities. 17 C.F.R. § 240.13d-101, Item 3. Rather, that entity must disclose the  
27 identity of the underlying investors on Schedule 13D Item 3. *Id.*

1       Similarly, Rule 13d-101, Item 6 requires disclosure of those contracts or  
2 understandings, including “naming the persons with whom such contracts . . . have  
3 been entered into.” 17 C.F.R. § 240.13d-101, Item 6. In its 13D filings, Politan  
4 represented that, besides certain stock swaps, it had “no contracts, arrangements,  
5 understandings or relationships (legal or otherwise) with respect to any securities of”  
6 Masimo. Ex. 7, -8. But it defies logic—and contradicts Politan’s June 2022 deck—to  
7 imagine that Politan’s investors would provide hundreds of millions of dollars to  
8 a new activist fund without knowing how that capital would be deployed. Politan  
9 must disclose those arrangements.

10       Politans has violated *a separate* obligation to disclose its investors: Item  
11 5(b)(1) of Rule 14a-101 requires Politan to identify “each participant” in its proxy  
12 solicitation, where a “participant” is defined to include anyone who “finance[d] . . .  
13 the solicitation of proxies.” 17 C.F.R. § 240.14a-101, Items 4 and 5. The funds  
14 Politan raised were not just for the purchase of Masimo securities, but also for  
15 Politan’s forthcoming proxy contests against the incumbent Masimo directors.  
16 Indeed, the deck Politan used to fundraise specifically discussed 2023 and 2024  
17 Masimo board elections, [REDACTED]

18 [REDACTED] Ex. 4, -1272, -1275. And Defendants concede [REDACTED]  
19 [REDACTED] Opp. 32. Yet, in violation of  
20 Item 5 of Rule 14a-3, Politan failed to disclose the identity of the investors that  
21 funded these efforts. 17 C.F.R. § 240.14a-3 (requiring certain information to be  
22 furnished before a proxy solicitation).

23       Finally, Defendants deny any obligation to disclose the investors who funded  
24 Politan’s purchase of Masimo securities and proxy fights by arguing that Masimo  
25 was “criticized” for pursuing this same information during the Delaware Bylaw  
26 litigation. Opp. 34. Leaving aside that the “criticism” was from a third-party amicus  
27 brief, that litigation was focused on the validity of Masimo’s bylaws—not Politan’s  
28

1 disclosure violations at issue here. The SEC rules require Politan to disclose the  
2 identity of the investors that gave it funds to pursue its “Single Investment” strategy.

**b. Politan Must Disclose It Sought Control From Outset**

4 Politan also violated Item 4 of Schedule 13D, which required Politan to reveal  
5 its intent in connection with its rapid accumulation of Masimo securities. 17 C.F.R.  
6 § 240.13d-101, Item 4. Defendants argue Politan's Item 4 disclosure was sufficient  
7 because it stated that Politan intended to "discuss" "the composition" of the Board,  
8 and Koffey's self-serving deposition testimony [REDACTED]

9 [REDACTED] Opp. 32-33. But none of that can be squared with what limited  
10 discovery<sup>2</sup> has revealed, which includes the 47-page June 2022 slide deck that  
11 Politan showed to investors that demonstrated its intention to take control of  
12 Masimo, and that Politan solicited funds specifically to purchase—and did  
13 purchase—**only Masimo securities** between at least May and November 2022. See  
14 Ex. 4 at -1268, -1272. Politan filed its Schedule 13D in August 2022, directly in the  
15 middle of its Masimo buying spree.

16 Defendants argue the June 2022 presentation does not expressly [REDACTED]  
17 [REDACTED]  
18 [REDACTED] Opp. 32. What Defendants  
19 ignore is that [REDACTED]  
20 [REDACTED]—which would result in the *replacement of four out of five*  
21 **Masimo directors**, giving Politan total control after the 2024 vote. The next  
22 substantive slide details [REDACTED] *Id.* -

24 <sup>2</sup> In two separate orders, the Court ordered Defendants to produce documents  
25 regarding Politan's initial investment thesis, plans, and strategy for its Masimo  
26 investment. Dkt. 13, 32; Dkt. 32; Dkt. 58. Defendants refused to do so. At an  
August 16, 2024 hearing regarding this discovery dispute, Defendants' counsel  
represented [REDACTED]

27 [REDACTED] Ex. 136, -24. Defendants finally  
28 produced the Single Investment presentation—a “PowerPoint presentation”—two days later. Defendants still have not produced a single email related to that presentation.

1 1275. The only logical inference from the deck is that Politan determined to pursue  
2 a two-year campaign for control of Masimo. Politan's contention that the  
3 presentation lacks the magic words that it intended to "take control" is beside the  
4 point. *See SEC v. Teo*, 746 F.3d 90, 100 (3d Cir. 2014) ("conversations" defendant  
5 had "about his intention to become a Board member" is "sufficient evidence" that  
6 defendant had "decided upon or intended a course of action").

7 **c. Politan's Material Omissions Require Correction**

8 In a final effort to avoid its disclosure obligations under the SEC rules,  
9 Defendants argue that Masimo's Section 13(d) claim is "[i]rrelevant" because  
10 "Masimo does not seek injunctive relief on" that claim. Opp. 32. That is inaccurate.  
11 Plaintiff's Supplemental Brief discussed three Section 13(d) violations and  
12 explained how omitting the information required to be disclosed under SEC rules  
13 caused the Politan Proxy Materials to be materially misleading in violation of  
14 Section 14(a). *See* Mot. 18-20. Defendants do not dispute that material  
15 misrepresentations and omissions otherwise required by 13(d) can serve as the basis  
16 for a Section 14(a) claim based on false statements and material omissions, as here.  
17 Mot. 18-19; *Allergan*, 2014 WL 5604539, at \*14-15 (granting preliminary injunction  
18 for violation of Section 14(a) based on defendant's failure to disclose information  
19 required by Rule 13(e)).

20 **3. Politan Must Correct Misstatements Regarding the Spin-off  
21 Process**

22 **Kiani's Purported "Demands" for Self-Interested Spin-Off Terms.**  
23 Politan lied about the origin of the spin-off terms to paint Kiani as the one who  
24 tanked the transaction—and to further Defendants' narrative about Kiani being self-  
25 interested. Ex. 86, -9. Defendants defend their statements by arguing that Kiani  
26 "proposed the spin-off" (Opp. 17), but who proposed the idea of a spin off in the  
27 first place is a red herring. The terms Politan couches as Kiani "demands"—Kiani's  
28 control of SpinCo and preservation of his existing Employment Agreement—are

1 terms on which Koffey was aligned. Ex. 121. The weight of the evidence establishes  
2 that it was *Koffey* who proposed these terms. Exs. 92, 124:2-13; 54, -8486 (January  
3 30 term sheet stating, “Joe to get either high vote stock or 50+% of NewMasimo”  
4 and “Special Payment not forfeited and instead triggered by above”); *see* Reynolds  
5 ¶¶4-6. The evidence from three witnesses confirms that Koffey himself described  
6 these two terms *as agreed*—and only later added a self-serving footnote to board  
7 minutes documenting the topic to manufacture a disagreement. Exs. 92, 122:10-  
8 123:5, 124:6-8; 86, -9 (falsely claiming that Koffey told Kiani as a single director he  
9 could not agree to the terms); 42; McClenahan ¶11; Reynolds ¶6; Chapek ¶8.<sup>3</sup>

10 Koffey’s testimony and his destruction of the relevant electronic information  
11 are further evidence that his version of these events is not reliable. [REDACTED]

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]. This story turned out  
16 to be false: Koffey’s counsel later admitted that Koffey had sent the term sheet to  
17 his lawyer for review on January 30 “as an attachment to a privileged email”; and  
18 after receiving “feedback” from that lawyer, Koffey revised the document before he  
19 presented it to Kiani. Ex. 139. Such inconsistencies are enough to infer that Koffey  
20 destroyed the information because he knew it conflicted with his narrative.<sup>4</sup>

21 The spin-off failed not because *Kiani* made self-interested demands, but  
22 because a majority of the Board recognized that Koffey had no intention of  
23 negotiating in good faith to create a viable SpinCo. [REDACTED]

24 \_\_\_\_\_  
25 <sup>3</sup> [REDACTED]  
26 [REDACTED]  
27 [REDACTED]

28 <sup>4</sup> At a minimum, the versions Koffey exchanged with Richard Brand on January 29  
or 30—which are not subject to any credible claim of privilege—should be  
produced. *See* Exs. 138, 264:18-265:15; 139 (confirming exchange of term sheet).

1 [REDACTED]  
2 [REDACTED] Koffey’s intention was to offload all of  
3 Masimo’s liabilities onto SpinCo., while depriving it of intellectual property and  
4 cash—an untenable proposition. Ex. 92, 181:25-182:15. Defendants’ claim that it  
5 was Kiani who insisted on controlling SpinCo is demonstrably false. Ex. 92, 184:16-  
6 24. Yet Politan continued to represent that *Kiani* demanded these terms and cratered  
7 a deal for selfish reasons. Ex. 86, -9-10 (falsely describing the agreed upon terms as  
8 Kiani’s “demands,” for example, “Mr. Kiani’s demands at this stage  
9 included...supermajority voting stock that would confer majority voting control to  
10 Mr. Kiani, granted to him without additional consideration”). The collective impact  
11 of these lies has been precisely what Politan and Koffey had hoped—ISS and Glass  
12 Lewis parroted a nearly identical false narrative. Exs. 111, -17-18; 112, -33-34.

13 **Pretextual Manipulation of the Committee Process.** Defendants’ statement  
14 that the Special Committee “unanimously” approved the revised term sheet in March  
15 is likewise misleading. Opp. 21. Koffey secured the Committee’s agreement to send  
16 the term sheet by withholding information from them, hijacking the process to serve  
17 his own agenda, and falsely misrepresenting that the agreement aligned with his  
18 prior discussions with Kiani. Mot. 11-12 (Exs. 51; 88; Reynolds ¶¶9-11). Koffey  
19 accomplished this deception by taking control of the advisor interactions—a point  
20 Defendants do not dispute—and misleading other Committee members (including  
21 Brennan) about the substance of prior discussions with Kiani and the ongoing  
22 Committee process.

23 *First*, Defendants are wrong that Plaintiff’s evidence is comprised of “only []  
24 Kiani’s testimony.” Opp. 17. Plaintiff cited testimony and documents from multiple  
25 witnesses. [REDACTED]

26 [REDACTED] Exs. 40; 92, 53:1-4, 57:4-  
27 9, 173:8-17; 93; Reynolds ¶11. Defendants offer no serious reason to discredit the  
28 testimony of Reynolds, a highly qualified independent director. Reynolds ¶¶1-3.

1                   *Second, Defendants' assertion* [REDACTED]

2 [REDACTED]—an entirely new  
3 explanation for his exclusion of other Committee members contradicted by Koffey's  
4 testimony—is wrong and beside the point. Politan's proxy disclosures imply that  
5 Kiani rejected terms the Committee unanimously developed. The facts show  
6 otherwise. Koffey alone provided strategic direction to the Committee's advisors to  
7 advance his interests, routinely excluding other Committee members from the  
8 conversation. Exs. 39; 46; 49; 51; 82. [REDACTED]

9 [REDACTED]  
10 [REDACTED] This backdrop makes  
11 Defendants' concession that Koffey never shared earlier term sheets with the other  
12 Committee members (Opp. 20) all the more critical: that he shared the documents  
13 with advisers he hand-picked and kept siloed does not excuse keeping the Committee  
14 in the dark. Koffey's touting of the “unanimous” approval of a Committee he  
15 manipulated is misleading.

16                   **4.     Politan Must Correct Misstatements Regarding the Joint  
17                   Venture**

18                   Masimo's motion highlighted four false statements about the potential JV.  
19 Mot. 21-22. In response, Defendants admitted the falsity of one of those statements:  
20 the receipt of the identity of the potential JV partner prior to May 16. Mot. 22; Opp.  
21 24. The remaining three statements are equally misleading.

22                   *First*, Politan claims that Masimo “refused to disclose” [REDACTED] until  
23 Koffey made his Section 220 demand on May 8. Opp. 22; Ex. 80. But (1) Kiani did  
24 not refuse to provide these details, even after Koffey and Brennan refused to sign  
25 the NDA and (2) Koffey and Brennan were already set to receive the identity at the  
26 next Board meeting. Mot. 13-14; 21-22.

27                   Indeed, it remains undisputed that [REDACTED] “was concerned that Mr. Koffey and  
28 Ms. Brennan would disclose [REDACTED] publicly in order to stifle the potential

1 transaction in advance of Masimo's stockholder meeting, and [REDACTED] asked us to take  
2 steps to ensure the confidentiality of our negotiations and [REDACTED]" Muhsin  
3 ¶4; *see also* Ex. 77, -1223 (Kiani asking board to sign NDA because "the JV Partner  
4 is very concerned about its identity being disclosed..."); [REDACTED]  
5 [REDACTED]

6 *Second*, Politan stated that Kiani intended to be chairman of a separated entity.  
7 [REDACTED]

8 [REDACTED]. Defendants ignore this uncontroverted evidence, citing  
9 to documents either pre-dating the term sheet, which have no substance, or which  
10 relate to Kiani's position in the spin-off rather than the JV. Opp. 24.

11 *Third*, Politan contends Kiani signed the joint venture term sheet without  
12 providing "any information to the Board." Opp. 23. The evidence is to the contrary.  
13 On April 30, [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 [REDACTED] Only thereafter was the non-binding term sheet signed on May 7. Ex.  
18 80, -9347. Unable to dispute this evidence, Defendants point to the April 30 Board  
19 Book, claiming [REDACTED]  
20 [REDACTED] But the minutes and materials from  
21 that meeting unequivocally demonstrate the Board's receipt of details of the  
22 Potential JV on April 30. Exs. 73, -3019; 70, -6638, -6640, -6646.

23 **5. Politan Must Correct Its Misstatements Regarding  
24 Onboarding**

25 Defendants' arguments regarding onboarding, the budget, and their refusal to  
26 sign the 10-K are outrageous mischaracterizations of Politan's statements.  
27 Defendants have misrepresented that Masimo's onboarding issues and information  
28 flow to the Board are so deficient as to reflect a corporate governance crisis.

1 Defendants' arguments are so deficient that, as board novices, they had to hire an  
2 expert (himself with no public board experience) to make their case. Defendants  
3 statements are false. *See, e.g.*, Ex. 142 (quoting email from Classon thanking Kiani  
4 for "outstanding onboarding session" and being "so generous with [his] time");  
5 Chapek ¶6.

**a. The Politan Directors' Refusal to Sign the 10-K and Conflicted S&C Consultation Were Pretextual**

8        While the Politan Directors assert they did not sign the 10-K because they  
9    believed they “did not receive sufficient information to be able to approve the  
10   financials consistent with their fiduciary duties,” Opp. 27, they do not even attempt  
11   to rebut sworn testimony proving otherwise. Chapek testified that Koffey did not  
12   sign because Koffey’s lawyers advised him “it would not look good if he had  
13   criticized the lack of information he had received and then signed the Form 10-K.”  
14   Chapek ¶11. As for Brennan, Defendants do not rebut undisputed evidence that her  
15   purported concerns were addressed (Mikkelson ¶3; McClenahan ¶9), the financial  
16   statements received a clean audit, and she did not mention any issues with the  
17   financial statements in her letter to stockholders yet refused to sign anyway. Ex. 93,  
18   62:20–63:14, 68:13–20.

19 Koffey and Brennan’s advice-of-counsel “defense” based on their personal  
20 consultation with Sullivan & Cromwell (“S&C”) (Opp. 19, 28) falls apart under  
21 basic scrutiny. [REDACTED]

24 [REDACTED] (based on Koffey's lie that he  
25 did not receive sufficient information)<sup>5</sup>—with no rigorous attempt to understand the

<sup>28</sup> <sup>5</sup> E.g., Ex. 124, -13578 (Koffey manipulating S&C by sharing incomplete and misleading information regarding information he requested and received).

1 facts, or apply serious standards that took into account the Board members' basic  
2 obligations and responsibilities.

3 Even setting aside the cursory nature of the request for advice, the Politan  
4 Directors knew S&C was indisputably conflicted; it had no business advising Board  
5 members in their individual capacities adverse to Masimo while representing a board  
6 special committee, without proper disclosure or waivers, which the Politan Directors  
7 deliberately did not obtain. Not only were Defendants obligated to disclose to the  
8 Board (and obtain consent for) their conflicted relationship with S&C, but their  
9 failure to disclose it to stockholders is a material omission. *See City of Dearborn*  
10 *Police & Fire Revised Ret. Sys. v. Brookfield Asset Mgmt. Inc.*, 314 A.3d 1108, 1134  
11 (Del. 2024) (special committee's counsel prior and concurrent work for transaction  
12 counterparty "were material facts for stockholders that required disclosure" in proxy  
13 materials).

14 **b. The Larcker Report Holds No Weight**

15 Defendants improperly rely on a late-disclosed expert report from David  
16 Larcker, an individual with zero background on Masimo ***who has never served on***  
17 ***a board of a public company***. Defendants themselves have extremely limited  
18 experience serving on public company boards (Koffey had none; Brennan served for  
19 a limited time on two prior boards). Mot. 6; Exs. 137, 10:16-12:2; 94, 97:4–5. They  
20 had no basis from their own experience to declare that their onboarding was so  
21 deficient as to demonstrate broken corporate governance. That they hired an expert  
22 who also has no public company board experience is telling.<sup>6</sup>

23 \_\_\_\_\_  
24 <sup>6</sup> The majority of statements Defendants contend are opinions subject to *Omnicare*  
25 are not. As to the small subset of statements that are qualified as beliefs, opinion  
26 statements like these are actionable when they "convey facts about the speaker's  
27 basis for holding that view." *Omnicare, Inc. v. Laborers Dist. Council Constr.*  
*Indus. Pension Fund*, 575 U.S. 175, 176 (2015). The onboarding statements are  
28 actionable because they falsely suggest a basis in fact where there is none. Opp. 24–  
25. Masimo's management went above and beyond to respond to Koffey and  
Brennan's excessive requests. McClenahan ¶¶ 3–4; Exs. 12–13 (sharing voluminous  
materials on request); 35,-7070; 24,-7102; 34; 125, -8834-38 (listing more than 150  
documents provided to Brennan and Koffey).



1 in January 2024 “that he was unable to find a deal on what he considered to be  
2 satisfactory terms.” *Id.* The implication of Politan’s statements is apparent: that  
3 Kiani was given carte blanche to run a sale process, and did not find any transaction  
4 that he considered to be on “satisfactory terms.” That fanciful story is contradicted  
5 by the evidence. The Global Head of M&A at Morgan Stanley affirmed that he  
6 updated Koffey and Brennan on the strategic alternative review process during an  
7 August 1, 2023 zoom meeting. Collins ¶2. In response, Politan had no choice but  
8 to file a supplemental proxy *conceding* that its prior statement that Koffey and  
9 Brennan did not receive a substantive update until October 2023 was false. Ex. 140;  
10 Opp. 28-29.

11 But Politan has not corrected two other false statements. First, Politan stated  
12 Kiani had authority to “carry out a sale without any obligation to” update the Board  
13 (Ex. 85, -6), but the Board minutes reflect no such thing and instead delegate to  
14 management the duty to [REDACTED]  
15 [REDACTED]

16 [REDACTED] Ex. 9, -995. Second, Politan stated “Kiani told the full Board that he was  
17 unable to find a deal on what he considered to be satisfactory terms.” Ex. 85, -6. In  
18 reality, *no deal* was available. There is a material difference between “not receiving  
19 an offer,” and not “find[ing] a deal on what [Kiani] considered to be satisfactory  
20 terms,” a misleading statement which leads investors to believe Kiani received offers  
21 and unilaterally determined they were not satisfactory. Opp. 29; Ex. 85, -6.

22 **7. Politan’s Supplemental Disclosures Do Not Moot Plaintiff’s  
23 Section 14(a) Claim**

24 Politan argues that by filing Masimo’s complaints and claiming that  
25 Defendants “den[y] all allegations,” it has mooted Plaintiff’s claims. Opp. 14; Exs.  
26 140, -2; 141, -2. But a statement that Defendants “vigorously den[y]” Plaintiff’s  
27 allegations does not moot Plaintiff’s claims. *Arvin Indus. v. Wanandi*, 722 F. Supp.  
28 532, 540–41 (S.D. Ind. 1989) (“informing the public of the existence of the dispute

1 is not enough to make the case nonjusticiable"); *Liberty National Ins. Holding v.*  
2 *Charter Co.* 734 F.2d 545, 560 (11th Cir. 1984) (same). Indeed, where, as here, a  
3 plaintiff seeks more than just an accurate 13D statement "a concrete controversy still  
4 remains." *Id.* n.31; *see also Dan River, Inc. v. Unitex, Ltd.*, 624 F.2d 1216, 1228  
5 (4th Cir.1980) (refusing to dismiss without discovery on issue of completeness of  
6 13D filing).

7 Defendants fail to acknowledge this authority and cite *none* holding that  
8 issuing a supplemental proxy appending a complaint moots a Section 14(a) claim,  
9 perhaps because that makes no sense. Merely denying Plaintiff's allegations,  
10 without disclosing the truth or correcting the factual misstatements, does not ensure  
11 an informed stockholder vote. To hold otherwise would nullify Section 14(a) in the  
12 context of a proxy contest as parties would have no obligation to disclose actual  
13 facts. *See Warner Commc'ns, Inc. v. Murdoch*, 581 F. Supp. 1482, 1501 (D. Del.  
14 1984) ("fact[s] must be disclosed, not the possibility of the fact[s]"); *Allergan*, 2014  
15 WL 5604539, \*15 (requiring disclosure of potential liability *and* the factual basis for  
16 their statements to ensure an informed vote).

17 **C. Defendants Concede the Proxy Materials Are an "Essential Link"**

18 Defendants do not dispute that if Masimo shows a likelihood of success on  
19 the merits, Masimo also satisfies transaction causation because Politan's proxy  
20 solicitation is an "essential link" to achieving the election of its slate. Opp. 12-13  
21 (conceding "essential link" is an element of Section 14(a) and failing to oppose it);  
22 *Hartranft v. Encore Cap. Grp.*, 543 F. Supp. 3d 893, 913-14 (S.D. Cal. 2021)  
23 (arguments unaddressed by non-moving party in opposition are waived).

24 **D. Defendants Do Not Rebut Masimo's Negligence Showing**

25 Politan is wrong that Masimo simply "recites" the negligence standard and  
26 describes it without pointing to evidence. Opp. 31. Extensive evidence supports  
27 that Politan was negligent in its Proxy Materials. Mot. 9-12, 20-23 (demonstrating  
28 Koffey negligently described, or intentionally misrepresented, the proposed spin-off

1 and his onboarding); Ex. 51, -2847 (confirming Koffey’s statement to the Special  
2 Committee was to “have as little clarity upfront as possible” to get the Special  
3 Committee “closer to evaluating other options”); Ex. 132. There can be no serious  
4 dispute that Politan failed to exercise “reasonable prudence” and that Masimo easily  
5 satisfies the negligence standard under federal securities laws. *See SEC v. Prakash*,  
6 2024 WL 781037, \*5 (N.D. Cal. Feb. 26, 2024).

7 **E. An Injunction Would Serve the Public Interest**

8 Defendants’ myopic view that this Court “should let [shareholders] vote”  
9 because it was “supposed to happen two months ago” should be rejected. Opp. at  
10 36. The touchstone of securities laws is ensuring a fully informed stockholder vote,  
11 not that potentially uninformed votes happen expeditiously. *See, e.g., Allergan*,  
12 2014 WL 5604539, at \*16 (informed shareholder vote serves the public interest).  
13 An injunction here serves the public interest by “preventing uninformed shareholder  
14 vote” and maintaining the integrity of corporate governance. *See, e.g., Taseko Mines*  
15 *Ltd. v. Raging River Cap.*, 185 F. Supp. 3d 87, 94 (D.D.C. 2016) (recognizing  
16 “effective enforcement” of securities laws); *Bender v. Jordan*, 439 F. Supp. 2d 139,  
17 178 (D.D.C. 2006) (same); *Lone Star Steakhouse & Saloon v. Adams*, 148 F. Supp.  
18 2d 1141, 1150 (D. Kan. 2001) (public interest is served by the truth).

19 **F. The Balance of Equities Strongly Favors Injunctive Relief**

20 Defendants offer no compelling response to Masimo’s cited cases confirming  
21 that the balance of equities favors Masimo: Masimo faces the threat of irreparable  
22 harm resulting from a potential change in control of the Board whereas Defendants  
23 face comparably little harm by being forced to correct their misleading disclosures  
24 so stockholders can cast an informed vote. Instead, Defendants dodge this point by  
25 repeating their unsubstantiated claim that Masimo conspired to engage in “empty  
26 voting.” Opp. 36. But, in fact, Masimo moved its record date and annual meeting  
27 at Politan’s request, and in accordance with an interpretation of SEC Rule 14a-13  
28

1 endorsed by the Delaware Chancery Court. Ex. 134, -39 (“I do read the rule the way  
2 the [Masimo] defendants do ...”).

3 Defendants argue that issuing corrective disclosures *would* harm them  
4 because a preliminary injunction could be viewed as an adjudication of wrongdoing.  
5 This argument is entirely circular. Defendants can’t make false statements and then  
6 cry foul when Masimo attempts to adjudicate them. Mot. 29 (citing *Lone Star*, 148  
7 F. Supp. 2d at 1150; *Allergan*, 2014 WL 5604539, \*16 (same)).

8 **III. CONCLUSION**

9 The Court should issue an order preliminary enjoining Defendants from  
10 voting any proxies solicited by them until corrective disclosures are made.

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1 Dated: September 4, 2024

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for Masimo Corporation, certifies that this brief contains 6997 words, which complies with the word limit of L.R. 11-6.1.

Dated: September 4, 2024

/s/ Michele D. Johnson

Michele D. Johnson